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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KENNETH F. CARPENTER JR., JOHNNY B. CORVIN,
BRYAN M. DRUMMOND, MICHAEL D. ELLIS,
EDWARD B. KNUDSON, JEFFREY B. RUSH,
and TOBY DEWEESE

Appeal 2009-1201
Application 09/773,883
Technology Center 2400

Decided:¹ April 2, 2009

Before JOSEPH F. RUGGIERO, JOHN A. JEFFERY, and
CARLA M. KRIVAK, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appellants appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 66-91. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants invented an interactive television application which displays selectable cells associated with entities that display information corresponding to the entities. Specifically, the user can navigate among various regions of cells, select a particular region, and then navigate among the cells in the selected region.² Claim 66 is illustrative:

66. A method for using an interactive application on a display screen to access content, the method comprising:

providing at least two cells on a display screen, wherein each of the at least two cells is operable to be associated with a television channel and is operable to display, within the cell, video content being broadcast on the television channel;

for each of at least one of the cells that is associated with a television channel, displaying an indicator which notifies a user of the availability of interactive content associated with the television channel associated with the cell;

grouping the at least two cells into a region;

displaying a region highlight that surrounds the cells in the region;

allowing a user to navigate a region highlight to the region, wherein no cell highlight appears on the display while the user is navigating the region highlight; and

² See generally Spec. 2:25 – 3:31; Figs. 7A, 7B.

in response to a user selection of the region surrounded by the region highlight:

displaying a cell highlight around a cell in the selected region;

allowing the user to navigate the cell highlight to each of the cells in the selected region, wherein only the cell that is surrounded by the cell highlight is in focus; and

for a cell for which an indicator is displayed and which is in focus, allowing the user to access the interactive content associated with the television channel associated with the cell.

The Examiner relies on the following prior art references to show unpatentability:

Lawler	US 5,585,838	Dec. 17, 1996
Matthews, III ("Matthews '145")	US 5,815,145	Sep. 29, 1998
Matthews, III ("Matthews '837")	US 6,025,837	Feb. 15, 2000 (filed Mar. 29, 1996)
Goldschmidt Iki	US 6,295,646 B1	Sep. 25, 2001 (filed Sep. 30, 1998)
Eldering	US 2002/0026638 A1	Feb. 28, 2002 (effectively filed Aug. 31, 2000) ³

Focus Highlight for World Wide Web Frames, 40 IBM Tech. Discl. Bull. 89, 89-90 (1997) ("IBM").

³ While this date is after the filing date of the two provisional applications from which the present application claims benefit (Feb. 1, 2000), Eldering's publication date is before the filing date of the present application (Jan. 31, 2001). In any event, Appellants have not disputed Eldering's qualification as prior art.

1. The Examiner rejected claims 66-68, 76-78, 86, 87, 89, and 90 under 35 U.S.C. § 103(a) as unpatentable over Eldering, IBM, Matthews ‘145, and Matthews ‘837 (Ans. 3-11).
2. The Examiner rejected claims 69-71, 79-81, 88, and 91 under 35 U.S.C. § 103(a) as unpatentable over Eldering, IBM, Matthews ‘145, Matthews ‘837, and Lawler (Ans. 11-12).
3. The Examiner rejected claims 72-75 and 82-85 under 35 U.S.C. § 103(a) as unpatentable over Eldering, IBM, Matthews ‘145, Matthews ‘837, and Goldschmidt Iki (Ans. 13-14).

Rather than repeat the arguments of Appellants or the Examiner, we refer to the Briefs and the Answer⁴ for their respective details. In this decision, we have considered only those arguments actually made by Appellants. Arguments which Appellants could have made but did not make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

THE OBVIOUSNESS REJECTION OVER ELDERING, IBM, MATTHEWS ‘145, AND MATTHEWS ‘837

Regarding the Examiner’s obviousness rejection of representative claim 66,⁵ Appellants argue that the cited prior art does not allow a user to

⁴ Throughout this opinion, we refer to (1) the Appeal Brief filed Oct. 5, 2007; (2) the Examiner’s Answer mailed Jan. 25, 2008; and (3) the Reply Brief filed Mar. 14, 2008.

⁵ Appellants argue independent claims 66 and 76 together and do not separately argue dependent claims 67, 68, 77, 78, 86, 87, 89, and 90. *See* App. Br. 5-12. Accordingly, we select claim 66 as representative. *See* 37 C.F.R. § 41.37(c)(1)(vii).

navigate a region highlight to a region, such that no cell highlight appears on the display while the user navigates the region highlight as claimed (App. Br. 8). According to Appellants, the method of the claimed invention is fundamentally a two-step approach: (1) the user navigates a region highlight to a desired region, and (2) in response to the user's selecting the desired region, the user can navigate a cell highlight to each cell within that region (Reply Br. 3-4).

According to Appellants, Eldering is silent as to whether the individual windows are selectable or navigable by a user, let alone teaching how a user would navigate among the windows (App. Br. 8). Appellants add that while IBM highlights a frame in a website to indicate that it has "input focus," the reference nonetheless is silent regarding navigating the highlight to other frames (App. Br. 8-9).

Appellants further argue that the Examiner's reason to combine the references is inadequate, and the references actually teach away from such a combination. According to Appellants, since Matthews '145 already provides a solution for navigating and selecting a group of programming tiles for display using a programming tile display strip such that only one region is displayed in the screen at a time, there would allegedly be no reason for skilled artisans to incorporate a region highlight to navigate between regions in the display screen (App. Br. 10-12; Reply Br. 7-8).

The Examiner takes the position that since Eldering's electronic program guide (EPG) is a frame-based internet application, skilled artisans would understand that users can navigate within web pages to select different objects or frames. This functionality, the Examiner reasons, would provide the ability to navigate between "regions" (Ans. 15). The Examiner

adds that, in view of IBM, skilled artisans would also provide a “navigation border” around a frame with “input focus” to enhance frame navigation (Ans. 16).

The Examiner also contends that there is ample reason to combine the cell highlighting features of Matthews ‘145 with the “region highlighting” features taught by Eldering and IBM. According to the Examiner, while Eldering and IBM collectively teach navigating and highlighting regions, the references do not detail the regions themselves. As such, the Examiner relies on Matthews ‘145 to show that it is known in the art to indicate selection of a particular item within a given region via a cell highlight. The Examiner concludes that applying this technique to Eldering’s system would yield predictable results, namely providing video images and user feedback regarding particular program listing selections (Ans. 17-18).

The issues before us, then, are as follows:

ISSUES

(1) Have Appellants shown that the Examiner erred in finding that Eldering, IBM, Matthews ‘145, and Matthews ‘837 collectively teach or suggest allowing a user to navigate a region highlight to a region, such that no cell highlight appears on the display while the user navigates the region highlight in rejecting claim 66 under § 103?

(2) Is the Examiner’s reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner’s obviousness conclusion?

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence:

Eldering

1. Eldering discloses a system for delivering targeted Internet-based⁶ advertising for insertion into advertisement portions of an EPG display (Eldering, Abstract).

2. To this end, EPG 100 comprises (1) an area (or window) 101⁷ for displaying program information, and (2) windows 103, 105, 107 for displaying advertisements (Eldering, ¶ 0032; Fig. 1).

3. The EPG advertisements comprise Internet-based data files (e.g., web pages) transmitted separately from the television programming (Eldering, ¶ 0035). Specifically, the advertisement files may comprise HTML pages with embedded streaming audio and/or video.

4. In some embodiments, “the guide portion and advertisements may each comprise different frames in a frameset in a manner that would be understood by persons of skill in the art of Web page design and implementation” (Eldering, ¶ 0040).

5. “[I]f the EPG itself is HTML based, the advertisements could simply be inserted as subwindows in the viewing area in any of several well-

⁶ Eldering defines the term “Internet based” as “encompassing all of the computer languages, file formats, and protocols commonly used in connection with Web pages on the World Wide Web and accessed through the Internet” (Eldering, ¶ 0036).

⁷ Eldering refers to this window as a “guide portion” 101 of the EPG (Eldering, ¶ 0039).

known manners, such as by using frames in a frameset, which would be readily familiar to those skilled in Web page design and programming” (Eldering, ¶ 0047).

6. According to Eldering, many EPGs are interactive such that a subscriber can select a particular item in an EPG using a remote control unit. For example, a user can position a cursor over an icon for a particular channel to obtain programming information for that channel (Eldering, ¶ 0010).

IBM

7. IBM teaches visually indicating that a particular frame of a web page has focus by providing a highlight border around that frame (IBM, at 1-2).

8. This technique (1) indicates to the user that the frame has focus, and (2) shows the boundaries of that frame. This indicator can be provided by the browser (IBM, at 2).

Matthews ‘145

9. Matthews ‘145 discloses a system that displays a program guide for an interactive television system where programming images corresponding to available programming are rendered simultaneously on a display. At least one of these images includes a video segment relating to the available programming on a selected channel, and the remaining programming images include single frame images relating to the programming available on the remaining selected channels (Matthews ‘145, Abstract).

10. This concept is shown in more detail in Figure 4 which illustrates a video display set’s display screen 98 with a video program guide 100. The

video program guide displays multiple video programming tiles 102 corresponding to programming available on selected channels during a programming schedule period. At least one of the tiles 102a includes a multi-frame video segment 104a relating to programming on a corresponding channel. Other tiles 102 include single frame images 104 (shown as blanks) related to programming available on other channels (Matthews '145, col. 4, ll. 44-55; Fig. 4). The display screen with a video program guide is shown in Figure 4 of Matthews '145 reproduced below:

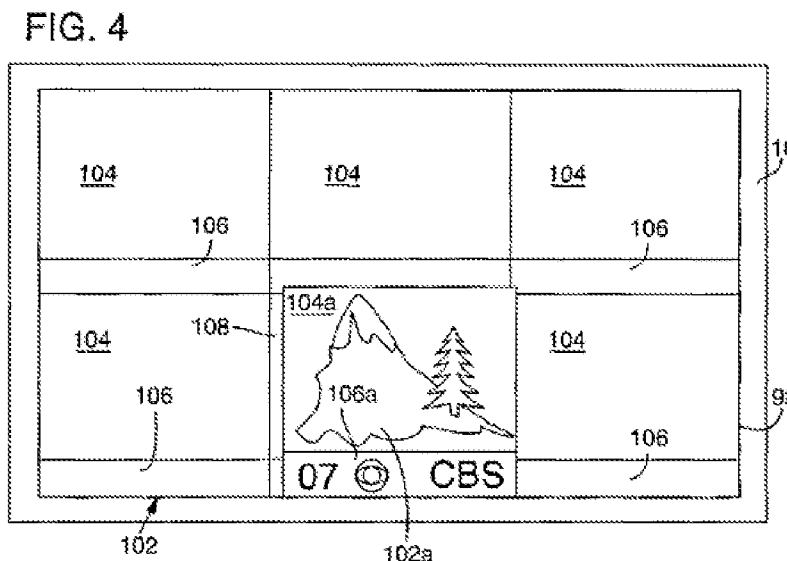


Figure 4 of Matthews '145 Showing a Display Screen With Video Program Guide

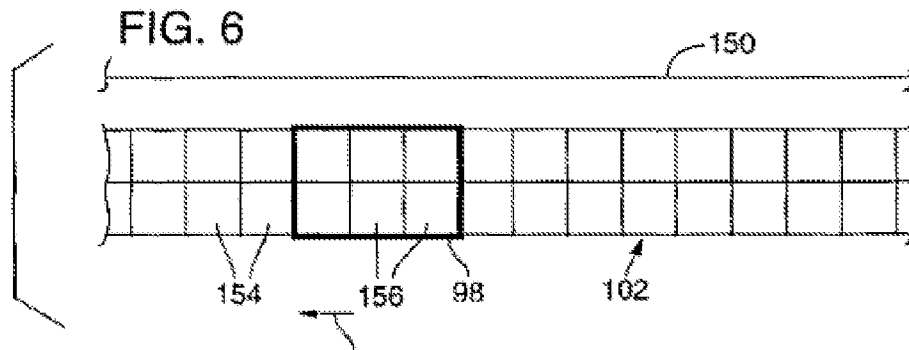
11. A viewer navigates between or selects video programming tiles 102 primarily with directional control keypad 90 by moving a cursor 108 between the tiles (Matthews '145, col. 4, l. 62 – col. 5, l. 2; Fig. 4).

12. The cursor 108 may be rendered as a graphic character or icon or by changing the graphic characteristics of the tiles where the cursor is positioned. The programming identified in a video programming tile 102 to

which a viewer moves the cursor 108 is referred to as “focused” programming (Matthews ‘145, col. 5, ll. 6-22; Fig. 4).

13. Another feature of Matthews ‘145 is a video programming guide space 150 that schematically represents the relationship between the video display screen 98 and the video programming tiles 102. Using this feature, a viewer can scroll through a video programming guide space 150 by moving the cursor rendered on the screen 98. For example, a viewer can move the cursor in a leftward direction 152 while the focused video programming tile 102a is a left-most one of the tiles on the screen. As shown in Figure 6,⁸ the cursor’s leftward translation causes the window corresponding to the video display screen 98 to shift leftward in the video programming guide space 150. As a result, tiles 154 previously outside the window of display screen 98 are included therein, and tiles 116 that were previously within the window of the display screen 98 are omitted therefrom (Matthews ‘145, col. 9, l. 62 – col. 10, l. 25; Fig. 6). This functionality of the video programming guide space is shown in the detail portion Figure 6 of Matthews ‘145 reproduced below:

⁸ The reference to “Fig. 6B” in connection with this passage in Matthews ‘145 (col. 10, l. 21) is an apparent typographical error since there is no such figure in the reference. We therefore presume that this reference was intended to be “Fig. 6.”



**Functionality of Video Programming Guide Space Shown in Detail
Portion of Figure 6 of Matthews '145**

14. A viewer can vary the arrangement of channels and program tiles 102 in the video programming guide space 150. For example, a viewer could modify the number of rows or orientation of the tiles (Matthews '145, col. 10, ll. 34-63; Figs. 4 and 6).

15. The video programming guide space 150 is a schematic representation between the video display screen and the video programming tiles 102 and does not literally correspond to the representation of the tiles within memory (Matthews '145, col. 10, ll. 5-10; Fig. 6).

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

Discussing the question of obviousness of claimed subject matter involving a combination of known elements, *KSR Int'l v. Teleflex, Inc.*, 550 U.S. 398, 127 S. Ct. 1727 (2007), explains:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* [v. *AG Pro, Inc.*, 425 U.S. 273 (1976)] and *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969)] are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

KSR, 127 S. Ct. at 1740. If the claimed subject matter cannot be fairly characterized as involving the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement, a holding of obviousness can be based on a showing that “there was an apparent reason to combine the known elements in the fashion claimed.” *Id.* at 1740-41. Such a showing requires

“some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness” [H]owever, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

Id. at 1741 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

If the Examiner’s burden is met, the burden then shifts to the Appellants to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

“[A]daptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art” (i.e., updating a children’s toy with modern electronic components to gain the commonly understood benefits of such adaptation) would have been obvious to ordinarily skilled artisans. *Leapfrog Enter., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007).

ANALYSIS

Based on the record before us, we find no error in the Examiner’s obviousness rejection of representative claim 66 which calls for, in pertinent part, allowing a user to navigate a region highlight to a region, such that no cell highlight appears on the display while the user navigates the region highlight.

First, we find no error in the Examiner’s interpreting Eldering’s windows 101, 103, 105, and 107 in the EPG 100 in Figure 1 as corresponding to the recited “regions.” While Eldering is short on specifics regarding the user’s ability to navigate among these windows or “regions” within the EPG 100, let alone highlight a particular region, we nonetheless find the Examiner’s position in this regard reasonable. We reach this conclusion noting the frame-based web page (HTML) structure of the EPG itself and the well-known ability to navigate and highlight various elements in such a web page are suggested by the prior art.

Notably, Eldering indicates that the EPG itself can be HTML-based (FF 5) where the windows can be implemented via frames in a frameset (FF 4-5). Second, IBM teaches visually indicating to a user (e.g., via a browser) that a particular frame of a web page has “focus” by providing a highlight

border around that frame (FF 7-8). By indicating to the user which frame of a web page has “focus,” the obvious inference from IBM is that the user can navigate among the various frames of the web page via a browser such that only one of those navigable frames has “focus” at a given point in time. That frame is so indicated to the user via highlighting. *See* FF 7 and 8.

Applying this teaching to Eldering, we see no reason why Eldering’s frame-based EPG—an HTML-based application (FF 5)—could not incorporate web page frame navigation and highlighting functionality such as that suggested by IBM. Such an improvement would predictably provide the ability to (1) navigate between frames (i.e., “regions”) in Eldering’s EPG, and (2) highlight a particular frame as desired. That Eldering actually recognizes that EPGs are interactive by allowing users to select a particular item in the EPG by positioning a cursor (FF 6) only bolsters our conclusion that providing frame-based navigation and highlighting capabilities in Eldering’s EPG is at least consistent with EPGs’ recognized user-navigation capabilities. To this end, navigating and highlighting frames in Eldering’s EPG in view of IBM would have been a predictable use of known web page capabilities according to their established functions—an obvious improvement. *See KSR*, 127 S. Ct. at 1740; *see also Leapfrog*, 485 F.3d at 1162 (holding that “adaptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art” (i.e., updating a children’s toy with modern electronic components to gain the commonly understood benefits of such adaptation) would have been obvious to ordinarily skilled artisans). We therefore find ample reason to combine Eldering and IBM as the Examiner proposes, and the Examiner’s point that this basis is consistent with *KSR* (Ans. 17) is well taken.

We further find no error in the Examiner's reliance on Matthews '145 (Ans. 18-19) for teaching navigating program listings via a cell-based presentation format for a particular region of a display and applying this teaching to a particular region of Eldering. In this regard, the Examiner intends the teachings of Matthews '145 to be applied to *only one region* of Eldering (i.e., the program listings) (Ans. 19).

As such, we agree with the Examiner that when Matthews '145 is applied to the Eldering/IBM system in this fashion, the user would be able to navigate among various frames or "regions" in Eldering and ultimately select (and highlight) the frame or region corresponding to the program listings (i.e., window 101 (*see* FF 2)). At that point, the user could be presented with an array of tiles (i.e., "cells") similar to those shown in Figure 4 of Matthews '145 (FF 10) which would allow the user to then position a "cell highlight" to select a desired tile or "cell" related to a particular available program. *See* FF 11 and 12.

It is unclear, however, whether a cell highlight in the window 101 of the modified Eldering system would appear on the display during this initial regional navigation—even when the region associated with the program listings (i.e., window 101) is not selected. This is a critical point since claim 66 expressly requires that *no cell highlight appear* on the display while the user navigates the region highlight.

Matthews '145 indicates that *at least one* of the tiles 102a includes a multi-frame video segment 104a relating to programming on a corresponding channel, and that the other tiles 102 include single frame images 104 (shown as blanks) related to programming available on other channels (FF 10; *emphasis added*). By distinguishing at least one tile from

the others in this manner or via other distinguishing graphical features (FF 12) for selection via cursor 108 (FF 11), Matthews ‘145 effectively “highlights” a tile (or “cell”) as shown in Figure 4.

Even if we assume, without deciding, that this cell highlight in Matthews ‘145 is intended to be displayed at all times *when the user displays the program guide*, we see no reason why the highlighted cell would have to be displayed at all times *when the user navigates among the regions* in Eldering. We reach this conclusion noting that three of the four regions in Eldering pertain to advertisements—not a program guide (FF 2). As such, we see no reason why the program information region 101 (where the Examiner proposes to include the cell-based program guide of Matthews ‘145) would have to constantly display any cells at all—let alone a highlighted cell—while the user navigates among the regions. Once this program information region 101 is selected, however, the display could then display the cells corresponding to the selected program guide region and allow the user to select a desired cell as in Matthews ‘145. *See* FF 10 and 11.

We also find ample reason on this record to combine Matthews ‘145 with Eldering and IBM. As noted above, providing Matthews ‘145’s cell-based selection functionality in Eldering would, at a minimum, enhance Eldering’s program listing window 101 by providing an interactive, graphical selection capability of available programs in a window of the EPG.

For this reason alone, we find no error in the Examiner’s combining Matthews ‘145 with the Eldering/IBM system to arrive at the claimed invention.

We reach a similar conclusion with respect to the functionality of Figure 6 of Matthews ‘145 which shows a video programming guide space 150 that schematically represents the relationship between the display screen 98 and the tiles 102 (FF 13). In this arrangement, the viewer can use the cursor to shift the display screen 98 with respect to the video programming guide space 150 and therefore change the tiles that are displayed in accordance with the tile arrangement in the video programming guide space (*Id.*). The display of a particular array of tiles on the display screen 98 dictated by a particular “region” in the corresponding video programming guide space 150 (*see* FF 13-14) reasonably corresponds to a “region highlight” as claimed.

Significantly, while the viewer moves the cursor (e.g., in a leftward direction), the focused video programming tile 102a is a left-most one of the tiles on the screen (*Id.*). While this passage suggests that a focused video programming tile (i.e., a “cell highlight”) is displayed during cursor movement, we see no reason why such a “highlight” need be displayed at all times during cursor movement, particularly since the user can navigate the “region highlight” (i.e., the particular array of displayed cells corresponding to the video programming guide space) beyond those that are shown in Figure 4. *See* FF 13. These other cells could be similar to tiles 104 (blanks)—tiles that are related to programming available on other channels and not “highlighted” like tile 102a. *See* FF 10. That Matthews ‘145 indicates that a viewer can vary the arrangement of channels and program tiles in the video programming guide space (FF 14) only bolsters this conclusion.

With this functionality, the user in Matthews ‘145 could navigate the “region highlight” to arrays of cells beyond those shown in Figure 4 that did not contain a “cell highlight” such as that shown for tile 104a. The very display of this array of cells would effectively “highlight” the region of cells. Then, the user in Matthews ‘145 could also navigate a particular cell highlight to select a particular cell in a particular region.

As we indicated above, there is ample reason to combine Matthews ‘145’s functionality with the other cited prior art, namely to provide a navigable program guide in the program information window of Eldering. This enhancement is tantamount to the predictable use of prior art elements according to their established functions—an obvious improvement. *See KSR*, 127 S. Ct. at 1740.

For the foregoing reasons, Appellants have not persuaded us of error in the Examiner’s rejection of representative claim 66. Therefore, we will sustain the Examiner’s rejection of that claim, and claims 67, 68, 76-78, 86, 87, 89, and 90 which fall with claim 66.

OTHER OBVIOUSNESS REJECTIONS

Likewise, we will sustain the Examiner’s obviousness rejections of (1) claims 69-71, 79-81, 88, and 91 over Eldering, IBM, Matthews ‘145, Matthews ‘837, and Lawler (Ans. 11-12), and (2) claims 72-75 and 82-85 over Eldering, IBM, Matthews ‘145, Matthews ‘837, and Goldschmidt Iki (Ans. 13-14). We find that Appellants have not particularly pointed out errors in the Examiner’s reasoning to persuasively rebut the Examiner’s prima facie case of obviousness, but merely noted that these claims are allowable for the same reasons as indicated with respect to the independent

claims (Br. 12-13). Thus, we are not persuaded that the Examiner erred for the same reasons discussed above with respect to claim 66. The rejections are therefore sustained.

CONCLUSION

Appellants have not shown that the Examiner erred in rejecting claims 66-91 under § 103.

ORDER

The Examiner's decision rejecting claims 66-91 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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